SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 851

SIDNEY J. GEFEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SIDNEY J. GEFEN prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 29, 1968.*

*Lois Gefen, although an appellant below, is not involved directly in the limited question here presented.

Reference to Opinions Below

The judgment of the District Court (R 65), printed in Appendix B hereto, *infra*, pp. 19-20, is not officially reported. The Findings of Fact and Conclusions of Law of the District Court (R 51-58) is reported in 18 AFTR 2d 5552. The opinion of the United States Court of Appeals, printed in Appendix B hereto, *infra*, pp. 4-16, is reported in 400 F.2d 476.

Jurisdiction

The judgment of the United States Court of Appeals (R 684), printed in Appendix B hereto, *infra*, p. 17, was entered on August 29, 1968. Rehearing was denied (R 690) on September 24, 1968. Appendix B, *infra*, p. 18. The jurisdiction of this Court is conferred by 28 U.S.C., § 1254 (1).

Question Presented

The government brought a civil action against a taxpayer to (1) reduce federal tax claims to judgment, and (2) foreclose the tax lien against the property of the taxpayer, alleging a 100% penalty assessment under the Internal Revenue Code and the refusal of the taxpayer to pay the assessment. The government asked the court to adjudge (1) that the taxpayer was indebted to it in the sum of $40,273.25, plus interest; (2) that it had a valid lien against the property of the taxpayer; and (3) that the federal tax lien be enforced against property of the taxpayer. The taxpayer denied each of the government's said allegations and timely demanded a jury trial. The question presented is whether in these circumstances the taxpayer is entitled to a jury trial.

Constitutional Provision and Statutes Involved

Amendment VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The statutory provisions involved are Sections 6671, 6672, 7403(a) and (c) and 7501, Internal Revenue Code, 1954, 68A Stat. 828, 26 U.S.C. §§ 6671, 6672, 7403(a) and (c) and 7501. They are printed in Appendix A, *infra*, pp. 1-3.

Statement

The United States of America filed a complaint in the United States District Court for the Middle District of Florida against Sidney J. Gefen, Lois Gefen and Prudential Insurance Company of America (R 7-11) March 10, 1964. The jurisdiction of the District Court was invoked under 28 U.S.C., §§ 1340 and 1345 and under the Internal Revenue Code of 1954. The District Director of Internal Revenue made a 100% penalty assessment under the Internal Revenue Code arising out of the withholding and F.I.C.A. tax liabilities of Georgia Shipbuilding Corporation in the amount of $47,991.17 for certain taxable quarters (R 9). Although the District Director gave petitioner notice of this assessment and made a demand for its payment, petitioner refused to pay the balance outstanding in the amount of $40,273.25 (R 9). The United States, in its complaint, sought a personal money judgment against the petitioner (R 10). Petitioner's answer filed October 9, 1964, denied the allegations of the government's complaint (R

13) and demanded a jury trial (R 15). The government, on August 9, 1965, moved to strike the demand for jury trial (R 15) and its motion was granted September 8, 1965 (R 16-17), on the authority of *Damsky* v. *Zavatt*, 289 F.2d 46. The District Court, sitting without a jury, tried the case on July 25, 1966, entered its findings of fact and conclusions of law August 5, 1966 (R 51-58), denied all post-trial motions (R 64) and entered judgment for the United States on October 27, 1966 (R 65-66).

The Court below affirmed. However, in referring to and indicating its dislike for the decision in *Damsky*, the court said:

> "And although the ossification of pre-1791 standards does not capture our unqualified enthusiasm, we follow *Damsky* until the Supreme Court frees us from its validated historical bondage.[5]"

App. B, *infra*, pp. 8-9.

In addition, marginal note 5 contained in the opinion of the United States Court of Appeals, Appendix B, *infra*, p. 9, outlines the basis for such dislike for *Damsky*.

Reasons Relied On for the Allowance of the Writ

1. The decisions of the court below in the instant case and in *Damsky*, upon the authority of which the instant case was decided, are directly in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *U. S.* v. *Strebler*, 313 F.2d 402. Neither this conflict nor the *Strebler* decision was mentioned by the court below. And, to some extent at least, the decision of the court below in the instant case itself conflicts with *Damsky* upon which it relied for affirmance.

In the *Gefen* opinion the court below recognized that the foreclosure of the federal tax lien was only part of the

judgment of the District Court, Appendix B, *infra*, p. 5. But, it fell short in not acknowledging that the largest part of the judgment was a personal money judgment against petitioner, Appendix B, *infra*, p. 20, with a small incidental foreclosure blended in. In *Damsky*, a jury trial was granted with regard to so much of the complaint as sought a judgment against Bernard Damsky for taxes, penalties and interest for which he was solely liable, holding that the action was for a money judgment and nothing more. This precisely was the government's case and technique in the instant case.

While *Strebler* specifically acknowledged the jury trial in an identical proceeding, the conflict, it is true, is subjective to the extent that the government apparently did not there raise the issue.

Consequently, the three decisions, *Damsky*, *Strebler* and *Gefen*, while triangulating the problem, confuse the isolated constitutional question and make it difficult, if not impossible, for the American taxpayer to determine in which jurisdiction he is entitled to a jury trial. The tremendous importance of this principle lies in the problem of the taxpayer's deciding whether to pay an assessment believed to be invalid and sue for a refund in order to have his jury, or to refuse to pay the assessment and await the complaint of the government, depending upon which circuit is involved. Thus, a financially poor taxpayer may effectively be denied his jury in either case.

It is respectfully suggested that the Supreme Court take jurisdiction here and resolve those doubts one way or the other, in order that there will be uniformity of the collection process and administration of the laws throughout the United States.

Perhaps the most impelling reason for allowing the writ is to disapprove further use by the government of the technique of blending a small but ostensibly equitable claim to the real legal claim for the purpose of denying the [redacted] mination of those legal factual issues, i.e., the truth of the claim of taxes owing as well as the validity of the assessment in the first place and the issues of responsibility and willfulness.

2. Clearly, the question presented is of importance in the administration of the federal tax laws which has not been, but should be, settled by the Supreme Court. Indeed, in the *Gefen* case the court below observed, Appendix B, *infra*, p. 9:

> "[5]The absolute reliance in *Damsky* on historical precedent has clearly produced a non-functional result in that, as has been pointed out by a student commentator, 'it denies the taxpayer who owns property a right to a jury trial, while the taxpayer who has no property is granted this right.' Note, 46 Minn. L. Rev. 643, 651 (1962)."

Settlement of the question by this court is principally in the public interest since it is likely to be presented in almost every civil action brought by the government to enforce a penalty assessment, including those now pending, and may very well involve every tax claim of the government because of the language of lien provisions of the tax law.

3. The decision of the court below is believed to be erroneous and the subtle approval of the jury trial in *Strebler* is believed to be correct. Moreover, the decision below probably conflicts with *Beacon Theatres, Inc.* v. *Westover*, 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 and *Dairy Queen, Inc.* v. *Wood*, 1962, 369 U.S. 469, 82 S.Ct. 894,

8 L.Ed.2d 44. We have clearly isolated the constitutional issue by demonstrating that the technique of the government is to impair the Seventh Amendment right by blending with its claim for a money judgment a demand for equitable relief in aid of the legal action. In *Beacon Theatres*, this Court, quoting from its opinion in *Scott* v. *Neely*, 140 U.S. 106, 109-110, 11 S.Ct. 712, 714, 35 L.Ed. 358, expressly condemned such strategy.

4. The decision below so far sanctions a departure by the federal trial judges from the accepted and usual course outlined by this Court recently in *Beacon Theatres* and *Dairy Queen*, as well as other decisions, so that petitioner believes that it is clearly apparent that there has been a departure from the essential requirements of law. The action of the District Court denied a fundamental right. Under the decision of the court below federal trial judges at the sole choice of the government can go in either of three directions, i.e., following *Gefen* on the one hand, *Damsky* on the other, or *Strebler* on still another. In addition, the government now has an unfair advantage over the taxpayer who has property as opposed to the one who does not. This non-uniformity in constitutional application and administration of federal tax law is wrong fundamentally. It exists also without regard to the value of the property although it may be minuscule in relation to the amount of the penalty assessments and the personal judgment sought.

Further, since this Court has held that it is within the undoubted power of Congress to provide any reasonable system for the collection of taxes, without a jury trial, *Wickwire* v. *Reinecke*, 275 U.S. 101, 48 S.Ct. 43, 72 L.Ed. 184, the denial of a jury in such cases should be left to the legislature.

The burden was on the taxpayer to show that he did not owe the taxes which were assessed against him, *C.I.R.*

v. *Hansen*, 360 U.S. 446, 79 S.Ct. 1270, 3 L.Ed.2d 1360. Whether or not the taxes were owed and validly assessed was challenged in petitioner's answer, clearly raising an issue of fact, the determination of which was an absolute essential to support the personal money judgment. That this was a "common law" legal issue of fact is most clearly and simply demonstrated by the language chosen by the framer of the government's complaint, where it prays that the trial court adjudge that petitioner is "indebted" to the United States in a sum certain (R 10). Consequently, rather than *Damsky*, this Court's decision in *Simler* v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691, is controlling in the instant case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and the writ allowed.

Respectfully submitted,

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APPENDIX A

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

(26 U.S.C. 1964 ed., Sec. 6671.)

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(26 U.S.C. 1964 ed., Sec. 6672.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * *

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

* * * *

(26 U.S.C. 1964 ed., Sec. 7403.)

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General Rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount

of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

* * * *

(26 U.S.C. 1964 ed., Sec. 7501.)

The corresponding provisions of the Internal Revenue Code of 1939 (Sections 1400, 1401(a) and (b), 1622(a), 1623 and 2707(a) and d)) do not differ from the above provisions of the Internal Revenue Code of 1954 in any material respect.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24440

SIDNEY J. GEFEN and LOIS GEFEN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(August 29, 1968)

Before BELL, GOLDBERG and DYER, Circuit Judges.

GOLDBERG, Circuit Judge: The government seeks affirmance of a judgment against Sidney and Lois Gefen for Sidney Gefen's [hereinafter Gefen] willful failure on behalf of Georgia Shipbuilding Corporation [hereinafter

Georgia Ship] to pay over certain withholding and F.I.C.A. tax liabilities. 26 U.S.C. §§ 6672 and 6671(b).[1] The District Court,[2] as part of its judgment, foreclosed the federal tax lien on any property of the taxpayers, specifically on the cash surrender value of a life insurance policy on Gefen's life with Lois Gefen as beneficiary. 26 U.S.C. §§ 6321 and 6322.[3] Gefen seeks reversal on two grounds First, he asserts that the District Court's refusal to grant a jury trial transgressed his rights under the Seventh

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1. § 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

§ 6671. Rules for application of assessable penalties

* * *

(b) Person defined.—The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

2. Jurisdiction of the District Court is authorized by 28 U.S.C. §§ 1340, 1345 and 26 U.S.C. §§ 7402, 7403.

3. § 6321. Lien for taxes

If a person liable to pay any tax neglects to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

§ 6322. Period of lien

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

Amendment to the Constitution and under Rule 38 of the Federal Rules of Civil Procedure.[4] Second, he contends that the Court erred in finding him to have been a responsible corporate officer with a duty to pay such taxes and in finding that he willfully failed to pay the taxes. We reject both points on appeal and affirm.

I. *Jury Trial in Tax Cases*

In *Damsky* v. *Zavatt*, 2 Cir. 1961, 289 F.2d 43, the Second Circuit considered the same procedural issues that we face here. In that case Bernard and Olga Damsky, husband and wife, had been assessed for non-payment of income taxes during a period of several years. In addition, tax liens had been filed on property owned by Olga for all except three of the years in question. Following the Damsky's timely demand for a jury trial and the government's motion to strike such demand, the Honorable Joseph C. Zavatt, District Judge, issued a written opinion and order granting the government's motion in full. *United States* v. *Damsky*, E.D. N.Y. 1960, 187 F.Supp. 404. The Damskys sought a writ of mandamus directing Judge Zavatt to vacate that order. In an opinion laden with thorough and exegetic historical credentials, Judge Friendly granted the writ with respect to these claims asserted solely against Bernard Damsky (only the years for which no tax liens had been filed). Judge Clark dissented as to this part of the opinion

4. Amendment VII—Civil Trials

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

* * *

but concurred in the remainder of the majority opinion, in which the Court refused to issue the writ with respect to the claims arising from foreclosure of the tax lien on Olga's property.

Our concern at bar is with that part of the majority opinion in *Damsky* which denied the taxpayers' right to a jury trial in the years of foreclosure. We quote Judge Friendly's foundational analysis in full:

> "At the opposite extreme from the claims against Bernard just considered lies so much of the complaint as seeks to establish the validity of the tax liens against Ollie's real properties and the sale of the properties to satisfy them.
>
> "Mr. Justice Story pointed out in Parsons v. Bedford, 1830, 3 Pet. 433, 446-447, 7 L.Ed. 732, that in view of the use of the phrase 'all cases in law and equity' in Article III of the Constitution and the historic practice 'that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court,' the natural conclusion from the reference to suits at common law in the Seventh Amendment is 'that this distinction was present to the minds of the framers of the amendment' and that they did not intend the amendment to apply to proceedings 'where equitable rights alone were recognized, and equitable remedies were administered.'
>
> "Foreclosure of the mortgagor's equity of redemption was an established head of equity jurisdiction well before 1791, How v. Vigures, 1 Rep. Ch. 32, 21 E.R. 499 (1623); Emanuel College v. Evans, 1 Rep. Ch. 18, 21 E.R. 494 (1625); and this necessarily embraced the determination of the amount and validity of the mortgage debt. 1 Glenn, Mortgages (1943), 399-400. The more modern method of foreclosure through decree of sale, provided for United States tax liens by I.R.C. § 7403, is sufficiently akin to the historic equity practice to preclude successful contention for a right to jury

> trial with respect to the ascertainment of the amount of the tax lien as against taxpayer's property and enforcement of the lien by sale. See 5 Moore, Federal Practice (2d ed. 1951), pp. 81, 109. United States v. Malakie, D.C.E.D. N.Y. 1960, 188 F.Supp. 592." 289 F.2d at 52-53.

In an equally scholarly analysis Judge Friendly upheld the right of the District Court to render a judgment against Olga personally for any deficiency which might have remained unsatisfied after judicial sale of the mortgaged premises. 289 F.2d at 54-55.

The District Court in the case at bar followed other district courts in denying a jury trial primarily on the basis of the *Damsky* decision. See *United States* v. *Warren*, W.D. N.C. 1964, 235 F.Supp. 638 (which embellishes *Damsky* by interpreting the language of Section 7403(c) as a rejection of jury trials in tax foreclosures); *United States* v. *Pentz*, N.D. Iowa 1962, 213 F.Supp. 521. In accord, *United States* v. *Malakie*, E.D. N.Y. 1960, 188 F.Supp. 592. See also Note, 46 *Minn. L. Rev.* 643 (1962) (an extensive and favorable review of the *Damsky* decision); Note, 110 *U. Pa. L. Rev.* 133 (1961) (a shorter review, also favorable); 5 Moore, *Federal Practice* ¶ 38.31[1] at 34-35, and ¶ 38.38 [4] at 45, (1967 Supp.) (which briefly summarizes the *Damsky* decision without evaluative comment); 2B Barron and Holtzoff, *Federal Practice and Procedure* § 872 at 17, (Wright ed., 1967 Supp.) (a similar summary of the *Damsky* decision); James, *Civil Procedure* § 8.11 at 378 n.4 (1965, also published in 1963 at 72 *Yale L. J.* 655, 691 n. 203) (which quotes Judge Clark's dissent objecting to the partial granting of a jury trial in *Damsky* and refers to it as "a wise and temperate judicial appraisal of the problem"). We likewise agree that the historicity of foreclosure as a ward of equity is documented accurately in Judge Friendly's scholarly opinion. And although the ossifica-

tion of pre-1791 standards does not capture our unqualified enthusiasm, we follow *Damsky* until the Supreme Court frees us from its validated historical bondage.[5]

II. *Gefen's Responsibility to Pay Taxes for Georgia Ship*

The following facts are undisputed. Gefen was a partner holding a 50% interest in MacDonnell Boats when on Au-

5. The absolute reliance in *Damsky* on historical precedent has clearly produced a non-functional result in that, as has been pointed out by a student commentator, "it denies the taxpayer who owns property a right to a jury trial, while the taxpayer who has no property is granted this right." Note, 46 *Minn. L. Rev.* 643, 651 (1962). Nevertheless, although we may wish to ignore certain outdated concepts of yore, our recourse to modern legal principles is restricted severely by the plain words of the Seventh Amendment. See note 4, *supra*. See also 5 *Moore, supra*, ¶ 38.11 [7]; 2B *Barron and Holtzoff, supra*, § 872; *James, supra*, §§ 8.1-8.11 (especially Professor James' critical analysis of competing tests in his conclusion, pp. 377-81 of his book, pp. 690-93 of the law review article).

In recent years the Supreme Court has indicated a willingness to abandon certain historical concepts in correlating a party's constitutional right to a jury with modern forms of pleading. *Beacon Theatres, Inc.* v. *Westover*, 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988; *Dairy Queen, Inc.* v. *Wood*, 1962, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44; *Meeker* v. *Ambassador Oil Corp.*, 1963, 375 U.S. 160, 84 S.Ct. 273, 11 L.Ed.2d 231, reversing per curiam the judgment of the Court of Appeals for the Tenth Circuit, 308 F.2d 875 (1962). See also *Thermo-Stitch, Inc.* v. *Chemi-Cord Processing Corp.*, 5 Cir., 1961, 294 F.2d 486 (quoted favorably in the *Dairy Queen* decision, *supra*, 369 U.S. at 473 n.8). Cf. *Fitzgerald* v. *United States Lines Co.*, 1963, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720. These decisions perhaps augur a more functional and less historical interpretation of the Seventh Amendment; however, at present we agree with Professor Wright's comments when considering *Beacon Theatres, supra*: "Perhaps the most that can be said by way of explanation . . . until further light is shed by the Supreme Court, is that it lends impetus toward finding a right to trial by jury in doubtful cases." 2B *Barron and Holtzoff, supra*, at p. 29. Moreover, our Circuit has expressly refused to constrict equity jurisdiction further than was done by the Supreme Court. *Swofford* v. *B & W, Inc.*, 5 Cir. 1964, 336 F.2d 406, 414, cert. den., 1965, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed. 2d 557, quoted and followed in *Local No. 92* v. *Norris*, 5 Cir. 1967, 383 F.2d 735, 741. Compare *International Brotherhood of Boilermakers, etc.* v. *Braswell*, 5 Cir. 1968, 388 F.2d 193, 197-98, cert. den., 20 L.Ed.2d 854. Especially in light of the above authority, we read no commanding language in the Supreme Court opinions to date which would cause us to deviate from the teachings of *Damsky*.

gust 18, 1952, a contract was executed with the Navy Department's Bureau of Ships for MacDonnell to build five motor gun boats. Thereafter, MacDonnell Boats was incorporated as Georgia Shipbuilding Corporation, with Gefen and his wife owning 50% of the capital stock. Gefen served as president of Georgia Ship and a member of its Board of Directors from the date of its incorporation until April 30, 1955, when he resigned and sold his entire interest in the corporation. During his tenure as president Gefen's signature was required on all checks drawn on the corporation's bank account. From July 1, 1954, until April 30, 1955, the period of time involved here, Georgia Ship accrued on its books and carried as a liability an accrued salary payable to Gefen of $2,000 per month. His accrual salary rate was the highest of any employee or officer of Georgia Ship, but he never received actual payment of any salary.

As early as July, 1954, Gefen participated in negotiations with the Navy to rescue Georgia Ship from financial difficulties. On September 23, 1954, these negotiations resulted in an amendment to the 1952 contract under which the Navy would make an advance payment of $172,000 to the corporation. The following items from the corporation's balance sheets clearly show the immediate outflow of funds to creditors after receipt of the $172,000 payment:

	31 Aug. 1954	*30 Sept. 1954*
Current Assets - Cash	$ 4,538.91	$ 45,678.54
Current Liabilities -		
Accounts Payable	130,173.49	26,451.47
Accrued Payroll Taxes	21,701.59	20.919.53

On October 30, 1954, Gefen, as president of Georgia Ship, signed Form 941, Employer's Quarterly Federal Tax Return, in which he declared liability for the following tax payments: (1) $10,508.54, representing federal income

taxes of the employees which the corporation had withheld from their wages and salaries during the third quarter of 1954; and (2) $5,052.98, representing the corporation's liability under the Federal Insurance Contributions Act (F.I.C.A.). This return, however was received by the office of the District Director of Internal Revenue without payment.

On November 9, 1954, the Navy again amended its contract with Georgia Ship and agreed to loan the company an additional sum of $50,000. Unlike the advancement of $172,000 in September, the loan agreement expressly provided for the use of the funds, stating in part:

> "These funds shall not be used to pay any part of the Contractor's delinquent withholding taxes without prior written approval of the Administering Office."

The loan agreement also required a Navy Special Account, and on November 10, 1954, such account was opened with Georgia Ship's bank in Jacksonville, with Gefen as the sole company officer authorized to make withdrawals on that account. On December 10, 1954, and on January 14, 1955, the company used funds presumably from that account to pay $17,431.99 and $8,971.66 for labor, material, and other expenses.

On January 24, 1955, Gefen sent a "Request for Amendment Without Consideration" to the Navy seeking further advance payments. The request read in part:

> "The contractor is being pressed for payment by the local Director of Internal Revenue and the Georgia Employment Security Agency for withholding taxes, social security taxes, . . . in the amount of $43,508.07. Of this amount $18,728.15 represents taxes from the third quarter, 1954, the balance is for the fourth quarter, 1954."

Seven days later, on January 31, 1955, Gefen signed Form 941 for the fourth quarter of 1954, declaring liability for that quarter in the sum of $19,844.62. The return was again received in the office of the District Director without payment.

Finally, on April 30, 1955, Gefen signed Form 941 for the first quarter of 1955, declaring liability for that quarter in the sum of $12,165.02. The return was received in the office of the District Director without payment. It was upon the basis of these three quarters that the government sought and the District Court granted the 100% penalty tax against Gefen.

Gefen's defense to the penalty tax posits two factual challenges to the District Court's findings. First, he asserts his initial ignorance of the above failure to pay taxes. Second, he claims that by the time he learned of the deficiencies, the company was financially unable to pay the taxes. In certain areas these two defenses are mutually inconsistent. For example, Gefen claims that on October 30, 1954, he signed a check for payment of taxes at the same time that he signed Form 941. According to Gefen, he was totally unaware that the tax had not been paid. However, at the conclusion of the last two periods in question, at which times Gefen admits knowledge of the tax deficiency but contends that the company was unable to pay (indeed he paints a picture of substantial but frustrated efforts on his part to raise money for paying the taxes), he also insists that he signed checks for payment of taxes at the same time that he signed Form 941.[6]

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6. During cross examination at trial Gefen testified as follows:

"Q. In the ordinary routine you would send it [a check for taxes] up to MacDonnell [the co-owner of Georgia Ship and the sole co-signer of company checks]?

A. That's right.

Q. And then it would be mailed in to the Internal Revenue Service?

Gefen, in his reconstructed image of his position as president of Georgia Ship, seeks the shelter of irresponsibility and naivete; however, the facts do not provide the foundation for such shelter. The evidence is without challenge that there were economic distress signals all around Gefen. Gefen admittedly participated in conferences with the Navy as early as July, 1954, concerning Georgia Ship's need for advance payments. He admittedly requested additional funds on January 24, 1955, and expressly stated as a justification the company's failure to pay withholding taxes (which failure had also been mentioned in the November 9 amendment to the Navy contract). Moreover, he admittedly participated in conferences with Jack Durant from the Jacksonville office of the I. R. S. concerning the failure to pay such taxes. Durant testified that their first conference occurred in the latter part of November, 1954, and although Gefen recalled the meetings as beginning a couple of months later, his memory was extremely indefinite in this regard.

In spite of the above indicia of financial awareness and responsibility, Gefen asserts that he was no more than a

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A. Correct.

Q. Is that true for this return of October 30, 1954? That is the one I just showed you.

A. Apparently so.

Q. I see. And this return of January 31, 1955. Is that so?

A. Yes, sir. Everytime I signed one I signed a check.

Q. I see. And you gave it to the bookkeeper?

A. That's right.

Q. And it was sent up for Mr. MacDonnell's signature. It came back.

A. That's right.

Q. And was mailed in to the Internal Revenue Service?

A. I thought so.

Q. You did?

A. Yes.

Q. Okay. And this one is the one for April 30, 1955?

A. Yes, sir."

passive figurehead who never looked at a company balance sheet (which kept a monthly record of "Accounts Payable-Accrued Payroll Tax"), who concentrated mainly on his other business interests, and who used his spacious office at Georgia Ship merely to read his personal mail. He claims that the only officer who exercised fiscal responsibility in the company was the Vice President and Treasurer, R. F. Cottrell. Cottrell did indeed seem to be the most active day-to-day executive in the company, but he owned no stock in Georgia Ship, he was not a member of the Board of Directors, and he could not sign checks on corporate accounts. Furthermore, Durant testified that Cottrell did not participate in conferences concerning Georgia Ship's tax liability until the latter part of April 1955 (shortly preceding Gefen's termination of his relationship with the company). Cottrell may have been the cicerone for Georgia Ship, but he was certainly not its master.

The District Court's findings of fact expressly provided that Gefen was the chief executive officer of Georgia Ship until April 30, 1955, and that he was a person required to collect, truthfully account for, and pay over the tax liabilities here involved. We conclude that Gefen's status in the company hierarchy and his authority, both apparent and actual, in relation to the specific tax liability in question leave little doubt as to the validity of those findings. See *Datlof* v. *United States*, E.D. Pa. 1966, 252 F.Supp. 11, 32-33, which lists criteria that courts have found useful in determining whether a taxpayer was a person required to pay over such taxes. See also *Kelly* v. *Lethert*, 8 Cir. 1966, 362 F.2d 629, 634, where the Court concluded:

> "The appellant, though a young man of 26, was a principal officer of the corporation from which the unpaid withholding taxes are due, and he was admittedly authorized to sign checks in the corporate name. His defense that he spent most of his time in selling, rather

than in executive and administrative operations of J. D. Davis Company, causes a sympathetic response from the Court but is factually no defense for failing to fulfill the duties of a corporate office of vice-president and treasurer authorized to make disbursements of corporate funds in discharge of corporate liabilities."

There is perhaps a bit more room for doubt concerning the District Court's conclusion that Gefen *willfully* failed to collect or truthfully account for and pay over the taxes in question.[7] In this regard the case at bar is similar to *United States* v. *Leuschner*, 9 Cir. 1964, 336 F.2d 246, wherein that Court affirmed a District Court's refusal to penalize the failure of Leuschner, a director and general manager of Yosemite Creek Company, for the company's failure to pay over withholding taxes. At trial Leuschner had testified that he had left signed checks and returns with the company comptroller, and the District Court had accepted such testimony as conclusive. The Ninth Circuit affirmed, stating both that, "the question is one of fact," and that the evidence would support a finding that, "Leuschner was negligent, which is not willfulness." 336 F.2d at 248.

The taxpayer at bar strives to attain the benefits of the *Leuschner* division, but for two important reasons such benefits do not lie within his grasp. First, the Ninth Circuit was careful to note that the controlling issues were those of fact and that the thrust of its opinion was determined in advance by the findings of the District Court. The findings in the case at bar, unlike those in *Leuschner*, go against the taxpayer. Second, the Ninth Circuit expressly held that any knowledge of tax deficiencies would auto-

7. We pause to restate the established principle that the term "willful" for purposes of Section 6672 of the Code does not require a finding of intent to defraud or to deprive the United States of taxes. It requires only that the choice to pay funds to other creditors instead of the government be made voluntarily, consciously, intentionally, and without reasonable cause. *Frazier* v. *United States*, 5 Cir. 1962, 304 F.2d 528; *Dillard* v. *Patterson*, 5 Cir. 1963, 326 F.2d 302; *Cash* v. *Campbell*, 5 Cir. 1965, 346 F.2d 670; *Hewitt* v. *United States*, 5 Cir. 1967, 377 F.2d 921.

matically remove from the taxpayer his veil of innocence. Thus, as to the second part of the assessment against Leuschner, that covering his failure to pay over the taxes after Yosemite Creek Company had closed down its business and had reformed under the name of Kadota Creek Company, the Court reversed the District Court's findings and assessed the penalty. We quote that section of the opinion in full:

> "We think, however, that in the case of taxes withheld by Kadota the result must be different. When Kadota took over the business, Leuscher knew that Anders, on whom he relied, had failed to see that such taxes were paid and had preferred other creditors. Yet he did absolutely nothing to see that this did not happen again. He was Anders' superior in the company. He had a duty to see that the taxes were paid. He knew that the withheld moneys were a trust fund for the United States, and were to be paid to it. He knew that Anders, to whom he looked to carry out that duty had not done it. He could no longer, in good faith, look to Anders to do his duty for him. His complete failure to do anything to see that Anders, or he himself, performed that duty, is, we think, as a matter of law, a 'voluntary, conscious and intentional' failure. The court's contrary finding is clearly erroneous." 336 F.2d at 248.

The District Court in the case at bar specifically found that in September, 1954, Gefen had participated in the decision to use the advance payment of $172,000 to pay other creditors. (Gefen's testimony is contrary with this finding, but MacDonnell's testimony is consistent with it.) We accept this finding as correct and, combining it with the other facts mentioned above, conclude that the District Court was warranted in assessing the tax penalty against Gefen. It was certainly within the Court's bounds of fact-finding to have rejected Gefen's protestations that, as to tax liability, he was merely an impotent and non-cognitive cog in Georgia Ship. We need not condone a game of blind man's buff in avoidance of a statutory duty.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24440

D. C. Docket No. 64-48-Civil Action-J

SIDNEY J. GEFEN and LOIS GEFEN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before BELL, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Sidney J. Gefen and Lois Gefen, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 29, 1968

Issued as Mandate: October 2, 1968.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24440

SIDNEY J. GEFEN and LOIS GEFEN,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Middle District of Florida

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(September 24, 1968)

ON PETITION FOR REHEARING

Before BELL, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

JUDGMENT

Filed October 27, 1966.

United States District Court, Middle District of Florida, Jacksonville Division.

United States of America, Plaintiff,

vs. No. 64-48-Civ.-J.

Sidney J. Gefen, Lois Gefen, and Prudential Insurance Company of America, Defendants.

This action came on for trial before the Court, Honorable William A. McRae, Jr., District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged:

1. That the defendant, Prudential Insurance Company of America shall pay, within thirty (30) days from the date of entry of this Judgment, to the plaintiff, the United States of America, the cash surrender value of its insurance policy No. 599,205 calculated to the date of this Judgment.

2. That the defendants, Sidney J. Gefen and Lois Gefen, execute and deliver to Prudential Insurance Company any and all documents necessary to effectuate the relinquishment and discharge of all right, title and interest of each of these defendants in and to the said insurance policy and the proceeds of the same, said action to be performed within thirty (30) days from the date of entry of this Judgment.

3. That if Sidney J. Gefen and Lois Gefen, or either of them, refuse, fail, or neglect to comply with the provisions of this Judgment directing them to execute and deliver the necessary documents as required by Prudential Insurance Company of America as a condition precedent to the payment of the cash surrender value of the said insurance policy within thirty (30) days of the date of entry of this Judgment, this Judgment shall stand as a Judgment directing the defendants, Sidney J. Gefen, and Lois Gefen, and Prudential Insurance Company of America to pay to the plaintiff the cash surrender value set forth herein, and for compliance with this Judgment, Prudential Insurance Company of America, shall be held without fault or any liability to Sidney J. Gefen and Lois Gefen, and their assignees, representatives, heirs, executors or estate.

4. That the plaintiff, the United States of America, do have and recover from Sidney J. Gefen the sum of $40,273.25, plus statutory interest at the rate of 6% per annum from and after August 23, 1956, to the date of entry of this Judgment in the sum of $24,661.69, less the cash surrender value of Prudential Insurance Company of America Policy No. 599,205 paid over to the United States of America.

Dated at Jacksonville, Florida, this 27 day of Oct., 1966.

WM. A. McRAE, JR.,
(William A. McRae, Jr.),
Judge.

APPENDIX C

UNITED STATES OF AMERICA,
Appellant,

v.

JOSEPH X. STREBLER,
Appellee.

No. 17088.

United States Court of Appeals
Eighth Circuit.

Feb. 15, 1963.

Stephen B. Wolfberg, Atty., Tax Division, Dept. of Justice, Washington, D. C., made argument for appellant and Louis F. Oberdorfer, Asst. Atty. Gen., Washington, D. C., Lee A. Jackson, George F. Lynch, and Stephen B. Wolfberg, Attys., Dept. of Justice, Washington, D. C., together with D. Jeff Lance, U. S. Atty., St. Louis, Mo., were on the brief.

Joseph X. Strebler, appellee was not represented by counsel and did not file brief.

Before VOGEL, BLACKMUN and RIDGE, Circuit Judges.

RIDGE, Circuit Judge.

Appellee, as president of Strebler and Landvatter, Inc., executed on behalf of that corporation and filed with the Collector of Internal Revenue at St. Louis, Missouri, an "Employer's Quarterly Federal Tax Return" (U. S. Treasury Form 941) showing a tax liability on the part of the corporation of $14,593.40, for Income and Social Security Taxes withheld from its employees' wages for the quarter ending December 31, 1950. Concededly, the corporation at

that time had sufficient funds in its bank account with which to pay the entire amount of the taxes due the Government as shown by that return, but not sufficient money in the bank to pay all its other current obligations. Therefore, appellee sent a check to the District Collector of Internal Revenue for only $2,593.40, along with the above quarterly return. Subsequently other payments made in respect to the above return reduced the amount due the Government thereon to $7,288.46.

On February 23, 1954, the District Director made a personal assessment of tax against appellee in the above amount pursuant to the provisions of § 2707(a) and (d) of the Internal Revenue Code of 1939. Appellee failing to pay such assessment, the instant action was commenced to enforce collection thereof. Appellee demanded a jury trial which resulted in a verdict in his favor. It is from the judgment entered on such verdict that the Government prosecutes the instant appeal, claiming error on the part of the District Court for denying its motion for a directed verdict and motion for judgment in its favor notwithstanding the verdict.[1]

It is the Government's primary contention that in the light of appellee's own testimony and other uncontradicted evidence adduced at the trial of this case, establishing that appellee was the responsible person who had the duty to pay over the F.I.C.A. and Income Taxes withheld by Strebler and Landvatter, Inc. from its employees' wages (2707(a) and (d) I.R.C.1939), and that his failure to do so

1. Questions of law raised by such motions are the same. Shaw v. Edward Hines Lumber Co., 249 F.2d 434 (7 Cir., 1957). This Court has stated that a motion for directed verdict or judgment notwithstanding the verdict should be granted if there is no substantial, i. e. not more than a mere scintilla of evidence to sustain the verdict. Roth v. Swanson, 145 F.2d 262 (8 Cir., 1944); Bradford-Kennedy Co. v. Fred G. Clark Co., 43 F.2d 675 (8 Cir., 1930).

was "willful",[2] the District Court erred in entering judgment on the verdict of the jury as returned. A secondary point raised relates to claim of error in the giving of instructions by the District Court which the Government asserts compels granting it a new trial if the contention as to its n. o. v. motion is not sustained. Ruling on the latter matter is pretermitted in light of the disposition hereinafter made of this appeal.

Appellee in the case at bar has not favored us with any brief or record in addition to that filed by the Government. He personally appeared at oral argument and simply stated: * * * "I rely on the jury's verdict!" Hence we have been called upon to search the printed record on appeal for some evidence which appellee might claim to sustain his verdict. After carefully doing so, we are of the opinion that no substantial evidence can be found in the record before us to sustain the verdict.

At the trial of the case at bar the Government introduced evidence by way of a "Certificate of Assessment" which revealed appellee's liability for the amount of taxes claimed. The law is that such assessment is presumptively correct; and "the burden is on the taxpayer to overcome this presumption" by countervailing proof. Paschal v. Blieden, 127 F.2d 398, 401 (8 Cir., 1942) and cases therein cited. Accord, United States v. Rindskopf, 105 U.S. 418, 26 L.Ed. 1131; Niles Bement Pond Co. v. United States, 281 U.S. 357, 50 S.Ct. 251, 74 L.Ed. 901 (1930); Lewis v. Reynolds, 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293.

Appellee did not adduce any evidence contesting the amount of the assessment as made, nor the Government's

2. "Willfully" as found in 2707(a) I.R.C. 1939 and referred to in this opinion, connotes only "voluntary and intentional action" as contrasted with "accidental" (Stanton v. Machiz, 183 F.Supp. 719 (D.C.Md.1960)) or done "without reasonable cause." Frazier v. United States, 304 F.2d 528 (5 Cir. 1962).

assertion that failure of the party responsible to pay over the amount of taxes withheld was not "willful". His sole contention at the trial was that he was not the officer or employee of the corporation who was under a duty to pay over the withheld Income and F.I.C.A. Taxes in question. Appellee, solely by oral testimony, sought to prove that, at the time the Company failed to pay over the taxes, one John Kirk (who was the president of a bank that was one of the company's principal creditors), along with the bookkeeper, Frank X. Muehlbauer, in the employ of Strebler and Landvatter, Inc., were the ones who made the financial decisions as to which bills due and owing by that company were to be paid and when. It was on that singular oral assertion by appellee that control of that company's financial affairs was in others, that he sought to avoid the tax obligations here in question. This notwithstanding the by-laws of Strebler and Landvatter, Inc. established it was appellee's duties as "president (and) chief executive of the corporation (who was to) have general supervision over the general policy, affairs and finances of the corporation" and all the other competent evidence in the record established that he personally exercised such authority and control of that company's financial affairs.

Particularly, it was established without contradiction that appellee, as President of that corporation, and his wife, as Secretary thereof, were persons authorized to jointly sign checks on the company's bank account. Further, it was uncontradicted that when the "Form 941" return, supra, was prepared by the company's bookkeeper appellee took it from the bookkeeper and said to him: "I'll handle this, personally." Concededly, appellee signed that "Employer's Quarterly Federal Tax Return" and mailed or caused it to be mailed, along with a check to

the District Director of Internal Revenue for only a part of the tax due. He signed all tax returns made by the company. He personally negotiated financial loans made to Strebler and Landvatter, Inc. The only inference from the record here is that he was wholly delegated the authority to act as a fiscal manager of that company's affairs and he did so act.

Appellee's oral statements that he was not the person with authority "to pay, collect, (and) truthfully account for and pay over the tax" in question is so equivocal, implausible, and insubstantial, in the light of the entire record here, we do not consider it to amount to a scintilla of evidence. We think it is sufficient to say, without verbatim recital, that what appellee attempted to develop thereby was not in contradiction of other record evidence and uncontradicted testimony of the vice president and bookkeeper of the corporation, to the effect that he (appellee) was the person responsible for payment over to the Government of Income and F.I.C.A. Taxes withheld by Strebler and Landvatter, Inc. His testimony, fairly considered, merely developed extenuating circumstances because of the precarious financial condition of the company, as to why the amount of the tax as shown by the return he had executed as its president, was not remitted in full. However, his testimony in that respect reasonably considered, reveals that other debts of the company were preferred and paid by checks signed by him when he knew that the company's obligation to pay the amount of Income and F.I.C.A. Taxes withheld from its employees' wages had not been paid.

Under Section 3661, I.R.C. 1939 such withheld taxes constituted a "fund in trust for the United States." Cf. Hercules Service Parts Corp. v. United States, 202 F.2d 938 (6 Cir., 1953). The only reasonable inference to be

made from this record is that as the responsible officer of the corporation he decided not to have the corporation pay over such trust fund; and, that "was a voluntary, conscious and intentional act" on his part "to prefer other creditors of the corporation over the United States." Bloom v. United States, 272 F.2d 215 (9 Cir., 1959), cert. den. 363 U.S. 803, 80 S.Ct. 1236, 4 L.Ed.2d 1146.

Applicable law to be considered in determining appellee's liability for the assessment of the taxes here in question is with keen judicial acumen, enlightenment and understanding stated by Judge Jertberg, speaking for the Ninth Circuit, in the case of Bloom v. United States, supra. The similarity of facts and appellee's contention in the case at bar with those stated in the Bloom case and the rulings therein made, have such a sameness, we can perceive no useful purpose being served for us to reiterate applicable law as declared by the Ninth Circuit in that opinion. Certainly if this opinion can be shortened by adherence to sound precedents we should not attempt to paraphrase the same. Therefore, we note our likemindedness of the law as declared by the Ninth Circuit in the Bloom case, supra, in relation to an assessment made under Section 2707(a) and (d) of the Internal Revenue Code of 1939, and assert controlling law of appellee's liability to the Government in the case at bar to be as therein declared. In accord: see Frazier v. United States, 304 F.2d 528 (5 Cir., 1962) Stanton v. Machiz, supra. Cf. Wilson v. United States, 250 F.2d 312 (9 Cir., 1958).

Appellee in the case at bar "not only failed to overcome the prima facie case made by the Government's evidence but, in fact, presented evidence which had the effect of supporting the Government's claim." Fiori v. Rothensies, Collector etc., 99 F.2d 922 (3 Cir., 1938). Though appellee was entitled to have the District Court "view the

evidence and all reasonable inferences that may be drawn therefrom in the light most favorable" to him, (Shaw v. Edward Hines Lumber Co., 249 F.2d 434, 43C) he "was not entitled to the benefit of unreasonable inferences" as made by the jury from the evidence in the case at bar. Chicago and North Western Railway Co. v. Strand, 300 F.2d 521 (8 Cir., 1962).

The judgment appealed from is reversed and this cause is remanded to the District Court, with direction to enter judgment in favor of the Government in accordance herewith.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 851

SIDNEY J. GEFEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 51–58) are not reported. The opinion of the court of appeals (Pet. App. 4–16) is reported at 400 F. 2d 476.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1968. (Pet. App. 17.) The petition for rehearing was denied on September 24, 1968. (Pet. App. 18.) The petition for a writ of certiorari was filed on December 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

338-451—69

QUESTION PRESENTED

Whether, in a civil action commenced by the United States to enforce a federal tax lien and to obtain a deficiency judgment against a taxpayer, the taxpayer is entitled to a jury trial with respect to his tax liability.

STATEMENT

The United States instituted this action under Sections 7402 and 7403 of the Internal Revenue Code of 1954, based upon an assessment against petitioner of a 100 percent penalty for failing to pay over certain withholding and F.I.C.A. taxes on behalf of Georgia Shipbuilding Corporation (Code Sections 6671(b) and 6672). The action sought to enforce the federal tax lien against taxpayer's property for payment of the penalty (Code Section 6321) and to obtain a deficiency judgment against him for the amount of the penalty in excess of the value of the lien.

Before the district court, the petitioner made demand for a jury, which was denied by that court (R. 16). Upon a trial of the substantive issues, the trial court held that petitioner was liable for the penalty imposed by Section 6672 as a responsible corporate officer who willfully failed to pay over the taxes. Accordingly, the court foreclosed the federal tax lien on petitioner's property (the cash surrender value of a life insurance policy on petitioner's life) and entered a deficiency judgment.[1] Petitioner ap-

[1] Petitioner's wife, Lois Gefen, was a party to the proceedings below only because she was beneficiary of the life insurance policy which the government sought to reach. She is not a party here, and the deficiency judgment was against petitioner alone.

pealed from both the denial of a jury trial and the determination of liability. The court of appeals affirmed with respect to both issues (Pet. App. 6). Petitioner seeks review by this Court only in respect of the denial of his request for a jury tral.

ARGUMENT

1. The decision of the court of appeals, that a taxpayer has no right to a jury trial in an action to foreclose a federal tax lien, is clearly correct and presents no issue warranting plenary consideration by this Court. The court below expressly based its decision upon that of the Court of Appeals for the Second Circuit in *Damsky* v. *Zavatt,* 289 F. 2d 46, and it conflicts in no way with any decision of any other court of appeals.[2]

This Court has stated unequivocally that

> * * * It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial—if only the

[2] Although a majority of the court in *Damsky* held that there was a right to jury trial as to the purely personal claim against one of the taxpayers there (Bernard Damsky), it held that the taxpayer against whom both lien enforcement and a deficiency judgment were sought (Ollie Damsky) had no jury right. Petitioner thus clearly errs in analogizing his situation to that of Bernard Damsky; clearly, his jury claim is identical to that of Ollie Damsky, which the Second Circuit rejected. Petitioner's contention that there is a conflict with *United States* v. *Strebler*, 313 F. 2d 402 (C.A. 8), is also erroneous. That case was a simple collection proceeding, not one for foreclosure of a tax lien, and there was no issue presented, or passed upon by the court, with respect to taxpayer's right to a jury.

> injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied. * * * [*Wickwire* v. *Reinecke*, 275 U.S. 101, 105–106.]

In reliance upon this principle, reiterated in *Phillips* v. *Commissioner*, 283 U.S. 589, 599 n. 9, Circuit Judge Clark's partial dissent in *Damsky* would properly have denied the jury claims made by all of the individuals involved in that case, including that of the taxpayer against whom only a claim for money judgment—not involving any lien on property in which he had an interest—was made. Judge Friendly's scholarly opinion for the majority found it unnecessary to decide this general constitutional question because it found that that particular taxpayer—and only he—had an implicit jury right by statute. But the majority did hold that there was no constitutional right to a jury trial for the taxpayer against whom—as against petitioner here—the claim was for foreclosure of a property lien and for a deficiency judgment. That claim was wholly equitable, like a suit for foreclosure of a mortgage, and moreover there was not statutory basis for requiring a jury. 289 F. 2d at 52–56. Thus, even if there were a constitutional or statutory right to a jury trial in some tax collection cases, petitioner's case is clearly not one of those cases.

The holding below is in no way inconsistent with this Court's statements with respect to the Seventh Amendment in *Beacon Theatres* v. *Westover*, 359 U.S. 500, and *Dairy Queen* v. *Wood*, 369 U.S. 469. Evidently, the principles of those cases do not apply

in the light of the general principle that there is no constitutional right to jury in federal tax litigation. And even if there were a constitutional jury right in tax collection suits that might be said to be analogous to traditional actions at law (a right which no court has, to our knowledge, asserted to exist), there is nothing in *Beacon Theatres* or *Dairy Queen* that would give such a right in a case like the present one. Those cases involved joinder in a single action of equitable claims with claims of a traditional legal character, and this Court held that such joinder should not impair the right to jury trial on the legal claims. The present case, on the other hand, is purely and simply a traditional equitable foreclosure action, in which liability on the underlying obligation is necessarily determined and a deficiency judgment may be decreed under the long-established "cleanup" doctrine. *Damsky* v. *Zavatt, supra,* 289 F. 2d at 54–55.

2. The issue presented by petitioner is of limited importance in the administration of the federal tax laws. This case involved foreclosure of the federal lien against the cash surrender value of petitioner's life insurance, a situation that is unlikely to arise again because Section 6332 of the Internal Revenue Code was amended in 1966 to permit direct levy against such an asset without need for judicial proceedings (80 Stat. 1135). In general, federal tax lien foreclosure actions (and federal tax collection actions in general) are comparatively unimportant because of the availability of such procedures that do not require the tax authorities to sue in collection matters (Code Sections 6331–6343).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

LORING W. POST,
ROBERT I. WAXMAN,
Attorneys.

FEBRUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 851

SIDNEY J. GEFEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

The argument is first raised in the brief in opposition that the action was one to "foreclose a federal tax lien". This statement appearing in the government's brief in opposition as to the nature of the action is clearly contrary to fact as supported by the record. It was not an action to enforce a federal tax lien against taxpayer's property for payment of a penalty and to obtain a deficiency judg-

ment against him. The opening paragraph of the Complaint (R. 7-11) clearly announced:

> "This is a civil action to reduce federal tax claims against the defendant, Sidney J. Gefen, to judgment and to foreclose the federal tax lien against the property of the said defendant."

The foreclosure feature (R. 8) was relatively minor and was only blended in with the common law claim, as is further revealed by the prayer for relief (R. 10):

> I
>
> That this Court adjudge and decree that the defendant, Sidney J. Gefen, is indebted to the United States in the amount of $40,273.25, plus statutory interest thereon according to law.
>
> II
>
> That this Court adjudge and decree that the United States of America has a valid lien against the property belonging to the defendant, Sidney J. Gefen, including the cash surrender value of the aforementioned policy."

Nowhere in the judgment itself is there any mention of a deficiency decree or judgment. To the contrary, the final judgment specifically states (R. 66):

> "4. That the plaintiff, the United States of America, do have and recover from Sidney J. Gefen the sum of $40,273.25, plus statutory interest at the rate of 6% per annum from and after August 23, 1956, to the date of entry of this Judgment in the sum of $24,661.69, less the cash surrender value of Prudential Insurance Company of America Policy No. 599,205 paid over to the United States of America."

The cash surrender value of the Prudential policy on the effective date of the judgment was $3,908.40 (App. 2).

The original 100% penalty assessment was in the sum of $47,991.17 (App. 1).

It is extremely unlikely that Congress, when it enacted the applicable provisions of the Internal Revenue Code, intended (since the laws do not specifically provide) that taxpayers owning an interest in any property be deprived of a jury in contesting 100% penalty assessments. If the intent were to the contrary or if the section of the code specifically so stated the provisions would be clearly unconstitutional, not only as a denial of Seventh Amendment rights, but as regards due process and uniform administration of the laws.

The United States endeavors to convince the court that the claim was wholly equitable, although the opinion of the court below clearly held "[t]he District Court, *as part of its judgment*, foreclosed the federal tax lien on any property of the taxpayers, * * *" (emphasis supplied) (Pet. App. 5). As the matter now stands, under the holding of the opinion below the trial courts [in those instances where the taxpayer is fortunate enough to have even a slight interest in any property] can deny the jury trial because of the fact that the suit to enforce collection is only *part* of the judgment.

What is the practical effect of this position on every officer or employee of every corporation or on a member or employee of every partnership who can be reasonably charged with a duty to perform under the collection provisions? The answer is obvious.

The government need not even file a notice of lien. As in this case, it relied solely upon the notice of the assessment, regardless of whether the assessment was valid.

The argument is also first raised by the government (Res. Brf. 5, ¶ 2) that federal tax lien foreclosure actions

and federal tax collection actions in general are comparatively unimportant. Although the government concedes that the issue presented by petitioner is of limited importance, it attempts to justify and support the asserted relative unimportance of the Seventh Amendment in these cases by three startling propositions:

First. Allegedly, the case below involved foreclosure of the federal lien against the cash surrender value of petitioner's life insurance;

Second. Such a situation is unlikely to arise again because § 6332 of the Internal Revenue Code was amended in 1966 to permit direct levy against such an asset without need for judicial proceedings; and

Third. Federal tax collection actions are comparatively unimportant because the tax authorities do not need the courts in collection matters.

As to the first proposition, neither the Complaint nor the Final Judgment sustain the assertions of the government. The second proposition is remarkable because until now the cited section has never been involved in this case and, even if it were, the 1966 amendment made no change in context as in the manner claimed by the government. Under § 6332 of the Internal Revenue Code prior to the 1966 amendment, direct levy was permitted. The third proposition, which is taken directly from the concluding sentence of paragraph 2 appearing on page 5 of the government's brief in opposition, is stunning to say the least. For the United States to argue that a citizen taxpayer has no rights in the courts as regards the tax collection process is portentous.

The important issue raised needs full consideration on the merits and decision by this Court.

CONCLUSION

As important to this nation as is the prompt collection of its revenues, it cannot be honestly contended that such exceeds the importance of the individual's rights and freedoms conceived in the first instance, by this nation's founders. Rather, it would seem that freedom from whimsical and non-uniform collection methods is as important as freedom from oppression. If the government is correct in its sweeping argument (Res. Brf. 5) that there is a "general principle that there is no constitutional right to jury in federal tax litigation" there is no due process against the power to destroy.

For, after all, as was unequivocally stated by this Court in *Simler* v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691:

> "The federal policy favoring jury trials is of historic and continuing strength."

Respectfully submitted,

JOSEPH M. GLICKSTEIN, JR.
1205 Universal Marion Building
Jacksonville, Florida 32202
Counsel for Petitioner

Form 17-MT

Treasury Department
Internal Revenue Service

Statement of Tax Due on Employer's Quarterly Federal Tax Return

(INCOME TAX WITH HELD FROM WAGES AND FICA TAXES)

S. J. CRITES 3959 Condora Ave. Jacksonville, Fla. DUPLICATE
R. F. COTTRELL 6542 Colgate Rd. Jacksonville, Fla.
JOEL R. WADDELL ST. MARYS GEORGIA
FORMER OFFICERS OF GEORGIA SHIPBUILDING CORP
WITHHOLDING PERIODS 9-54/12-54/3-55/6-55
100% PENALTY ASSESSMENT HELD ICA SEC 2707(a)6671 & 6672
29-6-MC-3-20003

DISTRICT DIRECTOR'S COPY

Assessment	Amount paid	Balance due
47,991.17		47,991.17

Dated Aug 23, 1956

This bill for the amount shown as "Balance due", which includes interest to date of this notice, is sent to you in accordance with law. The law also provides that if the amount due is not paid within 10 days from such date, interest will accrue on the unpaid tax to the date of payment.

Amounts shown in "Assessment" above are for tax unless identified as penalty by letter "P" or interest by letter "I."

Please return this notice with payment to District Director of Internal Revenue at

ULMER, MURCHISON, KENT, ASHBY & BALL
FLORIDA NATIONAL BANK BUILDING
POST OFFICE BOX 479
JACKSONVILLE, FLORIDA 32201

HERMAN ULMER
CHARLES H. MURCHISON
FREDERICK H. KENT
CLARENCE G. ASHBY
JOHN W. BALL
HERMAN ULMER, JR.
DAVISSON F. DUNLAP
W. SPERRY LEE
JAMES B. TAYLOR
JOHN D. CORSE
GILCHRIST B. STOCKTON, JR.
FREDERICK H. KENT, JR.
LEWIS S. LEE
HAYWOOD H. BALL
JOHN B. KENT

TELEPHONE 354-5088
AREA CODE 904

November 4, 1966

Joseph Glickstein, Jr., Esquire
1205 Universal Marion Bldg.
Jacksonville, Florida

Re: United States of America
v. Gefen and The Prudential
Insurance Company of America

Dear Joe:

With reference to the above, I have been advised by The Prudential that Mr. Gefen is considering borrowing the full loan value of the insurance policy in order to settle the government's interest therein. For your information, the loan value of the policy calculated as of November 15, is $3,541.00. The cash surrender value as of October 27 (which is the effective date of the judgment) was $3,908.40. Presumably, Mr. Gefen will have to pay the government the difference between the loan and the cash surrender value, which in this case would be $367.40.

Mr. Gefen advised Prudential that if he does go through with this transaction he would transfer the ownership of the policy to his wife. I am, therefore, enclosing the following documents which will be necessary to complete the transaction so far as Prudential is concerned.

1. Application for the loan value of the policy.

2. A form of transfer of ownership to Mrs. Gefen.

3. A form terminating Mr. Gefen's interest as contingent beneficiary. We assume that this is what he wants.

If Mrs. Gefen should predecease Mr. Gefen her estate would

own the policy and would be the beneficiary.

In completing these forms please see that the loan certificate and the beneficiary provision are dated prior to the transfer of ownership.

Upon the return of all of these documents to us with the original policy, we will proceed to put through the loan drawing Prudential's check to the joint order of the United States and Mr. Gefen.

We will of course want a complete release from the United States and I assume that you can make the necessary arrangements for such a release.

In accordance with the judgment entered by the District Court, Mr. and Mrs. Gefen are directed to execute and deliver to The Prudential, the documents necessary to effect the relinquishment of all of their rights in the insurance policy. If Mr. Gefen wishes to make other arrangements concerning the insurance please let us know so that we can furnish you with the appropriate relinquishment forms. In either event, the surrender of the original policy is required.

Best personal regards.

Sincerely,

For the Firm

JST:vm
Enclosure

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 851

SIDNEY J. GEFEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Rehearing

Petitioner presents his petition for a rehearing of this Court's order dated March 3, 1969, denying the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

1. The decisions of the court below in the instant case and in *Damsky v. Zavatt*, 289 F.2d 46, upon the authority of which the instant case was decided, are directly in conflict with the decisions of this court in *Lipke v. Lederer*, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1921), *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 43 S.Ct. 152, 67 L.Ed. 318 (1922) and *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958). Moreover, the decision below probably conflicts with *United States v. Rindskopf*, 105 U.S. 418, 26 L.Ed. 1131 (1881) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963).

Neither of the opinions of the courts below referred to those opinions.

To illustrate the direct conflict it is necessary to set forth pertinent portions of the record below.

The government's complaint against the taxpayer set forth:

"III.

This Court has jurisdiction of this action under Title 28, United States Code, Sections 1340 and 1345, and under Sections 7402 and 7403, Internal Revenue Code of 1954.

VIII.

On August 23, 1956, the District Director of Internal Revenue, a delegate of the Secretary of the Treasury of the United States, made a 100% penalty assessment under Sections 6671 and 6672, Internal Revenue Code of 1954, arising out of the withholding and Federal Insurance Corporation Act tax liabilities of the Georgia Shipbuilding Corporation, St. Marys, Georgia,

in the amount of $47,991.17 for the taxable quarters ended September 30, 1954, December 31, 1954, March 31, 1955, and June 30, 1955. Although the District Director of Internal Revenue gave the defendant, Sidney J. Gefen, notice of this assessment and made a demand for its payment on August 23, 1956, the defendant has refused and continues to refuse to pay the balance outstanding on this assessment, and this balance in the amount of $40,273.25, plus statutory interest thereon is still due and owing to the United States by Sidney J. Gefen." (R. 8, 9)

At the commencement of the trial, the court ruled:

"The Court:

I think the defendant has the burden of proof. That will be the ruling of the Court." (R. 72)

The provisions of the United States Code contained in said allegations and otherwise applicable are:

§ 1395. Fine, penalty or forfeiture

(a) A civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues or the defendant is found. June 25, 1948, c. 646, 62 Stat. 936. (28 U.S.C. § 1395, 28 U.S.C.A. § 1395)

§ 6671. Rules for application of assessable penalties

(a) *Penalty assessed as tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall

be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. Aug. 16, 1954, c. 736, 68A Stat. 828. (26 U.S.C. § 6671, 26 U.S.C.A. § 6671)

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable. Aug. 16, 1954, c. 736, 68A Stat. 828. (26 U.S.C. § 6672, 26 U.S.C.A. § 6672)

§ 7202. Willful failure to collect or pay over tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954,

c. 736, 68A Stat. 851. (26 U.S.C. § 7202, 26 U.S.C.A. § 7202)

§ 7401. Authorization

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. Aug. 16, 1954, c. 736, 68A Stat. 873. (26 U.S.C. § 7401, 26 U.S.C.A. § 7401)

Mr. Justice McReynolds delivering the opinion of the Court in *Lipke* stated:

"

* * * * * * *

The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. Child Labor Tax Case (May 15, 1922) [259 U. S. 20, ante, 817, 21 A.L.R. 1432, 42 Sup. Ct. Rep. 449]. When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613, 47 L. ed. 614, 617, 23 Sup. Ct. Rep. 427. *Evidence of crime (§ 29) is essential to assessment under § 35.* It lacks all the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government," and clearly involves the idea of punishment for infraction of the law,—the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324, 58 L. ed. 980, 982, 34 Sup. Ct. Rep. 596. * * *

And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be en-

> forced through the secret findings and summary action of executive officers. *The guaranties of due process of law and trial by jury are not to be forgotten or disregarded.* * * * " (Emphasis supplied)

In *Speiser* the Court stated:

> " * * * But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. Lipke v. Lederer, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061; cf. Helwig v. United States, 188 U.S. 605, 23 S.Ct. 427, 47 L.Ed. 614. The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate * * * "

In their application of the foregoing provisions of the code the courts below reached a result which should be unacceptable to this Court. Clearly, petitioner's Fifth and Sixth Amendment rights are violated in several respects. There can be little question that Congress intended the imposition of a severe penalty upon the adoption of § 6672. Both the House Report and the Senate Report, in identical language, state:

> " * * * a penalty equal to the total amount of the tax evaded * * *. However, the application of this penalty is limited only to the collected or withheld taxes which are imposed on some person other

> than the person who is required to collect, account for and pay over the tax." 1954 U. S. Code Cong. and Adm. News, pp. 4568, 5245.

As to the relationship of that section to § 7202, the House Report further says:

> " * * * This provision corresponds to numerous sections of existing law which cover this offense." 1954 U. S. Code Cong. and Adm. News, p. 4572.

Thus, the same criteria, i.e., willfulness, failure to collect and pay over, etc., are elements of both offenses; one leading to the imposition of a civil penalty and the other imprisonment or fine or both fine and imprisonment. *Evidence of crime (§ 7202) is essential to assessment under § 6672.* It should also be noted that the fine under § 7202 applied in the case below is approximately 20% of the penalty actually levied on petitioner. However, petitioner was clearly prosecuted for a penalty (28 U.S.C. § 1395; 26 U.S.C. §§ 6671, 6672, 7401).

Since the taxpayer is required to make payment of the penalty out of his private property, as opposed to funds which he has collected from others or belong to the government, it constitutes a taking of his property, therefore due process is required.

It is as much a denial of due process to deny a defendant a jury under § 6672 as it would be under § 7202, as the standards of incrimination are the same and the penalty under § 6672 in this particular case is far greater.

2. The "due process" question is of great importance in the administration of the tax laws. Not only is every person who is a "responsible officer" affected, but this matter reaches even the housewife who is required to collect from her domestic servant.

3. Should the Justice Department commence prosecution (under § 7202) after an adjudication (as below) of the fact of willfulness (under § 6672) against a taxpayer, that taxpayer would in such case, be estopped to deny the essential facts by *res judicata.*

4. Due process of law has for centuries been accepted as a procedural guarantee, extending to accused persons all the safeguards of a fair and impartial trial. The American Constitution, Kelly & Harbison, p. 389. The Legislature could not have intended the result reached by the courts below. Were it otherwise, there is little doubt but that this Court would hold the provision unconstitutional. Should this Court do less where the application of the provision violates due process of law and reaches an impermissible result in the face of the Constitution?

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Joseph M. Glickstein, Jr.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, JOSEPH M. GLICKSTEIN, JR., counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Joseph M. Glickstein, Jr.
1205 Universal Marion Building
Jacksonville, Florida 32202
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that five (5) copies hereof have been served upon Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, by United States Air Mail, postage prepaid, this 25th day of March, 1969.

.....

Counselor for Petitioner